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No. 83-963

In The

Supreme Court of the United States

October Term, 1983

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON,

Petitioner,

vs.

LOUIS H. PASTORE, JR., in his capacity as
Liquor Control Administrator of the
State of Rhode Island and
ATTIC LOUNGE, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE RHODE ISLAND SUPREME COURT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 13, 1983
CERTIORARI GRANTED JULY 5, 1984

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RELEVANT DOCKET ENTRIES

1977

March 11 Tiverton police raid Attic Lounge pursuant to search warrant later held invalid by Newport County Superior Court, and discover stolen goods on premises.

March 28 Tiverton Town Council, sitting as Board of License Commissioners, revokes BV liquor license of Attic Lounge due to existence of stolen goods on premises.

STATE OF RHODE ISLAND
PROVIDENCE, Sc.

DEPARTMENT OF BUSINESS REGULATION
LIQUOR CONTROL ADMINISTRATION

ATTIC LOUNGE, INC.
d/b/a CABARET
469 MAIN ROAD
TIVERTON

vs.

BOARD OF LICENSE COMMISSIONERS
TOWN OF TIVERTON

1977

April 6 Attic Lounge files appeal from revocation of liquor license to Rhode Island Liquor Control Administrator.

1978

July 6 Hearing before Rhode Island Liquor Control Administrator Louise Pastore re appeal of Attic Lounge from license revocation by Tiverton Board of License Commissioners. At said hearing, evidence presented that criminal charges pending against officers of Attic Lounge dismissed because of court holding that search warrant relied upon by Tiverton police was defective.

August 3 Decision of Rhode Island Liquor Control Administrator overturns Attic Lounge's license revocation on the ground that because no convictions resulted from finding of stolen goods on the Attic Lounge premises, that no license revocation could occur pursuant to RIGL 3-5-23.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

SUPERIOR COURT

PROVIDENCE, Sc.

C.A. NO. 78-2659

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON

vs.

LOUIS H. PASTORE, JR., in his capacity as Liquor Control Administrator and ATTIC LOUNGE, INC.

1978

Sept. 1 Complaint filed in Providence County Superior Court by Tiverton Board of License Commissioners appealing the decision of the Rhode Island Liquor Control Administrator.

1980

August 6 Decision filed by Providence County Superior Court, Justice Corrine Grande, affirming decision of Liquor Control Administrator on the ground that the exclusionary rule barred the Tiverton Board of License Commissioners from revoking Attic Lounge license on the basis of evidence obtained by illegal warrant.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

SUPREME COURT

PROVIDENCE, Sc.

No. 80-426 M.P.

BOARD OF LICENSE COMMISSIONERS OF THE
TOWN OF TIVERTON

vs.

LOUIS H. PASTORE, JR., in his capacity as Liquor Control Administrator; and ATTIC LOUNGE, INC.

1980

Sept. 23 Petition for Writ of Certiorari filed in Rhode Island Supreme Court by Tiverton Board of License Commissioners requesting review of Superior Court decision.

1980

Octo. 31 Rhode Island Supreme Court grants Certiorari Petition for review of Superior Court decision.

Nov. 18 Certiorari Writ issues from Rhode Island Supreme Court for transmittal of file from Providence County Superior Court to Rhode Island Supreme Court.

1983

April 7 Oral argument on Petition by both parties.

July 18 Decision of Rhode Island Supreme Court filed denying Tiverton Board of License Commissioners' Petition for Certiorari and affirming Providence County Superior Court decision that exclusionary rule barred revocation of Attic Lounge's liquor license on the basis of evidence obtained by illegal warrant.

IN THE SUPREME COURT OF THE
UNITED STATES

No. 83-963

BOARD OF LICENSE COMMISSIONERS
OF THE TOWN OF TIVERTON

vs.

LOUIS H. PASTORE, JR., in his capacity as Liquor Control Administrator of the State of Rhode Island and ATTIC LOUNGE, INC.

1983

Dec. 13 Petition for Writ of Certiorari filed by Tiverton Board of License Commissioners with the United States Supreme Court seeking review of decision of Rhode Island Supreme Court.

1984

July 5 United States Supreme Court grants Petitioners' request for Certiorari review of decision of Rhode Island Supreme Court.

OPINIONS BELOW

A. Decision of Board of License Commissioners of the Town of Tiverton, March 28, 1977.

Council Meeting of March 28, 1977

The Tiverton Town Council was sitting as the Board of Licensing Commissioners:

Atty. Abatuno of Providence represented the owners of the Attic Lounge, Inc.

Mr. Abatuno urged Council to look at Title III Chapter 5-23 which is Council's authority to consider the re-

vocation of a liquor license. Line two of this Chapter requires a conviction to revoke this license and Mr. Abatuno contended there was no conviction.

Town Solicitor Arthur Murphy advised that a conviction was not necessary for the revocation of a liquor license.

Mr. Abatuno requested he be allowed to call witnesses in this matter.

Police Chief Washburn was sworn in as an adverse witness and questioned by Mr. Abatuno.

Chief Washburn stated he had received a tip from the Fall River Police Department that there were stolen goods on the property of the Attic Lounge, Inc., 469 Main Road, Tiverton, R.I., obtained a search warrant, entered premises and discovered stolen property. Officer Paul Carey of Fall River Police Department was sworn in and testified that he had contacted the Tiverton Police Department of this matter.

Mr. Abatuno stated that Mr. Roger Benoit and Mr. Alfred Morrell were the two men charged with this felony by the Police Department, they are the bartender and manager, respectively.

Town Solicitor Murphy submitted photos of the establishment showing the goods in question and statement of Complaining Witness taken by Det. Peter Dias of the Tiverton Police Department and asked that they be entered as Exhibits A, B, C, and D.

Atty. Abatuno stated that Mario Ferreira and Mr. John Souza were present this evening, that they are the two stockholders in the corporation, which is so stated on

the license application, they knew nothing about this and asked that they be sworn in to testify.

Mr. Ferreira was sworn in by Council President Dias.

Mr. Abatuno asked Mr. Ferreira where he was on the night that Police entered the Attic Lounge and discovered the stolen goods.

Mr. Ferreira stated he was working at his gas station in East Providence and knew nothing of this, and had not been on the premises for at least one month prior to this date March 11, 1977.

Town Solicitor Murphy asked what percentage the stock Mr. Ferreira owned.

Mr. Ferreira answered 100%.

Mr. Murphy asked if any of the shares of the corporation were pledged to Mr. Joseph Callahan.

Mr. Abatuno answered he believed they were—he believed they were pledged to a loan.

Mr. Murphy asked if Mr. Callahan physically handled all of the stock certificates of the corporation.

Mr. Ferreira answered that Mr. Callahan handled the operation of the business

It was established that Mr. Mario Ferreira, Mr. John Souza and Mr. Michael Silvia together held 100% of the shares of the corporation.

Mr. John Souza was then called upon to testify. He was sworn in by the Council President, Dias.

Mr. Souza advised that he had no knowledge of the goods being at the Attic Lounge.

Town Solicitor Murphy asked Mr. Souza if he owned 1/3 of the stock if his shares were also pledged to Mr. Joseph Callahan and when was the last time he (Mr. Souza) was in the establishment.

Mr. Souza replied that he did own 1/3 of the stock which was also pledged to Mr. Joseph Callahan and that he had not been on the premises of the Attic Lounge for over a year.

Mr. Murphy asked Mr. Souza if he made any decisions with reference to the Attic Lounge.

Mr. Souza replied that his attorney made the decisions. Mr. Joseph Callahan was his attorney.

Motion by Carreiro, seconded by Barboza to revoke the Liquor License of the Attic Lounge, Inc. of 469 Main Rd. Tiverton, R.I.

For the motion: Carreiro, Dias, Barboza, Brilhante.

Against: Souza, Durfee, Tidwell.

Motion passed on a 4 to 3 vote.

A true copy Attest:

/s/ Alice R. Hawkins
Deputy Town Clerk

OPINIONS BELOW

B. Decision of Louis H. Pastore, Jr., Liquor Control Administrator, August 3, 1978.

STATE OF RHODE ISLAND
PROVIDENCE, Sc.

DEPARTMENT OF BUSINESS REGULATION
LIQUOR CONTROL ADMINISTRATION

ATTIC LOUNGE, INC., d/b/a CABARET
469 MAIN ROAD, TIVERTON

vs.

BOARD OF LICENSE COMMISSIONERS
TOWN OF TIVERTON

DECISION

Appellant, Attic Lounge, Inc., received notice in the form of certified mail, dated March 21, 1977, from Arthur W. Murphy, Esquire, Town Solicitor, that the Licensing Board of the Town of Tiverton was to hold a public hearing on Monday, March 28, 1977, at which hearing Attic Lounge, Inc. was to show cause why its Class BV license should not be suspended or revoked for violation of Rhode Island General Laws 1956, as amended, Section 3-5-23 in that the licensee permitted the laws of the State of Rhode Island to be violated on the licensed premises. Said notice further indicated that the license holder knew by the exercise of reasonable care that the licensed premises contained stolen goods in violation of the General Laws of the State of Rhode Island.

The notice further indicated that at the hearing, the licensee could be represented by an attorney and that failure to attend would be cause for revocation of his license.

The hearing to show cause was duly held on March 28, 1977. At said hearing, counsel for the licensee requested that the Board of License Commissioners carefully consider the revocation of the license in question for Rhode Island General Laws Section 3-5-23, required a conviction to revoke the license and at that point in time there was no conviction.

The hearing continued and information and evidence was presented that the Tiverton police had entered the licensed premises under a search warrant and discovered stolen property thereon. At the conclusion of the testimony and evidence at said hearing, the Board of License Commissioners by a four to three vote determined and in fact did revoke the liquor license for Attic Lounge, Inc. for its Class BV license for the premises situated at 469 Main Road, Tiverton, Rhode Island.

Thereupon, appeal was duly taken to this office and a hearing *de novo* was held on said appeal on July 6, 1978 at which time both parties were represented by counsel and provided with the opportunity to present witnesses to examine and cross-examine said witnesses.

On the hearing before this Board, evidence was introduced that neither the license holder, Attic Lounge, Inc., nor the principals involved in that corporation had been convicted as a result of the alleged stolen goods having been found on the licensed premises. This fact was uncontroverted. The Town of Tiverton on the other hand took the position that a conviction was not necessary for a revocation of a liquor license. Attorney for the licensee argued to this Administrator as he had previously done before the License Commissioners of the Town of Tiverton, that the Rhode Island General Laws

referred to at the time of hearing before the License Commissioners did in fact require a conviction.

Section 3-5-23 is entitled "Revocation of license for criminal offenses or disorderly conditions . . . " The pertinent part of that General Law reads as follows:

> "If any licensed person shall be convicted of violation of any of the provisions of this title or of chapter 6, chapter 10, chapter 34, chapter 40 or chapter 45 of title 11, or of § 11-2-1, § 11-3-4, § 11-9-13, § 11-9-15, § 11-11-5, § 11-11-6, §11-18-2, to 11-18-4, inclusive, § 11-20-1, § 11-20-2, § 11-23-4, §11-27-20, §§ 11-30-1 to 11-30-11, inclusive, § 11-31-1 or §§ 11-37-2 to 11-37-4, inclusive, or shall plead guilty or nolo contendere to any complaint or indictment thereunder . . . his bond shall be put in suit by the town. . . ."

The statute further goes on to indicate that:

> "If any licensed person shall . . . permit any of the laws of this state to be violated therein . . . and if it shall be made to appear to the satisfaction of the board . . . that he has violated any provisions of this title (Title 3) or has permitted to be done any of the things hereinbefore in this section mentioned, then said board, . . . may suspend or revoke his license . . ."

The record is clear and uncontroverted that there was in fact no conviction as required by Section 3-5-23.

It is this Board's determination, based upon all the evidence before it, that the action of the Board of License Commissioners was premature inasmuch as there was no conviction as required by the statute at the time of the hearing.

Consequently, the decision of the Board of Licensing Commissioners in revoking the license in the instant mat-

ter is overturned and said Board of License Commissioners is hereby directed to reinstate said license forthwith.

/s/ Louis H. Pastore, Jr.
Liquor Control Administrator

DATED: August 3, 1978

OPINIONS BELOW

C. Decision of Providence County Superior Court, August 6, 1980.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

C.A. NO. 78-2659

BOARD OF LICENSE COMMISSIONERS OF THE TOWN OF TIVERTON

v.

LOUIS H. PASTORE, JR., in his capacity as Liquor Control Administrator and ATTIC LOUNGE, INC.

D E C I S I O N

GRANDE, J. The matter before the Court is an appeal from a decision of the Liquor Control Administrator. The Administrator overturned a decision of the Board of License Commissioners of the Town of Tiverton revoking the Class BV liquor license of the Attic Lounge, Inc., d/b/a Cabaret, located at 469 Main Road in Tiverton. The issues are 1) whether a liquor license may be revoked on the basis that the holder, even though he has not been con-

victed of a crime, permitted a violation of law to occur on the premises, and 2) whether the exclusionary rule applies to hearings before the Liquor Control Administrator.

On March 11, 1977 a Tiverton police sergeant, pursuant to a search warrant, entered and searched Attic Lounge and discovered stolen property on the premises. On March 28, 1977 the Board held a hearing at which Attic Lounge failed to show cause why its liquor license should not be suspended for permitting state law to be violated on the premises in violation of *Rhode Island General Laws* § 3-5-23, *infra*. Testimony was taken concerning the discovery of stolen goods on the premises, and the Board voted to revoke the establishment's liquor license. Attic Lounge appealed the Board's decision to the state Liquor Control Administrator. In the meantime this Court, in a decision written by Mr. Justice Carrellas and filed in Newport on January 16, 1978, ruled in a criminal proceeding stemming from the same incident that the March 11, 1977 search of Attic Lounge had been an illegal search.

The Liquor Control Administrator, pursuant to Attic Lounge's appeal of the Board's decision to revoke, held a *de novo* hearing on July 6, 1978. The Administrator heard uncontradicted testimony that neither Attic Lounge nor any individual involved with that establishment had been convicted of any crime as a result of the goods found on the licensed premises. The Administrator ruled on August 3, 1978 that the license of Attic Lounge could not be revoked on the basis of the presence of stolen goods because there had been no criminal conviction for receiving stolen goods.

The Board, in its appeal to this Court, argues that the Administrator erred in holding as a matter of law that a criminal conviction is a necessary prerequisite for revocation in these circumstances. See *R.I.G.L.* § 11-41-2. The Board also contends that in attempting to show that the licenses permitted a state law to be violated on the premises, the Board may use evidence obtained as a result of the search which this Court previously found to be illegal.

The Board's argument that a prior conviction is not a prerequisite for revocation is correct. The statute in question, *R.I. G.L.* § 3-5-23, reads in relevant part

> . . . *If any licensed person* shall permit the house or place where he is licensed to sell beverages under the provisions of this title to become disorderly so as to annoy and disturb the persons inhabiting or residing in the neighborhood thereof, or shall permit any gambling or unlawful gaming to be carried on therein, or *shall permit any of the laws of this state to be violated therein, in addition to any punishment, penalty or penalties which may be prescribed by statute for such offense, he may be summoned before the board, body or official which issued his license or before the liquor control administrator* when he and the witnesses for and against him may be heard; *and if it shall be made to appear to the satisfaction of the board, body or official hearing such charges that he has violated any of the provisions of this title or has permitted to be done any of the things hereinbefore in this section mentioned, then said board, body or official may suspend or revoke his license* or enter other order thereon. . . . (Emphasis added.)

There are at least three reasons why this statute should not be construed as requiring a prior conviction for revocation in circumstances such as those in the case at bar. First and foremost, the statute does not expressly state

that a conviction is necessary, and the statutory language does not appear to imply that one is necessary. If the licensed person "shall permit . . . the place . . . to become disorderly so as to annoy and disturb the persons inhabiting or residing in the neighborhood," the license clearly may be revoked without any criminal conviction. This does not appear to be disputed. The Court does not see why the words "shall permit any of the laws of this state to be violated therein" should warrant a different construction. If the licensee "shall permit any of the laws of this state to be violated therein" and if such a violation is shown "to the satisfaction of the board" or administrator, then the board or administrator may revoke the license. Second, our state Supreme Court has stated that a liquor license revocation proceeding and a criminal action based on the same incident are entirely separate proceedings which are in no way dependent upon one another. In *Chernov Enterprises, Inc. v. Sarkas*, 109 R.I. 283, 284 A.2d 61 (1971), the court stated

> [Petitioner] completely ignores the established principal that a proceeding under the laws regulating the sale of alcoholic beverages is entirely separate and distinct from a criminal prosecution for the same offense, and that the two proceedings, rather than being interdependent or mutually exclusive, are co-existant. While one is in the nature of an action in rem, the other is against a licensee personally. Both may be instituted and pursued simultaneously or otherwise. *Id.* at 288, 64. See also *DiTraglia v. Daneker*, 83 R.I. 227, 115 A.2d 345 (1955).

Third, the power of the legislature to regulate strictly and pervasively the sale of alcoholic beverages by delegating the control of liquor traffic to administrators and local boards has long been recognized. Our state Supreme Court

emphasized this point to *Vitterito v. Sportsman's Lodge*, 102 R.I. 72, 228 A.2d 119 (1967):

> It is well settled that the business of the sale of intoxicating liquor is so completely subject to the exercise of the police power of the state that it may even be entirely prohibited by the State, or it may be authorized subject to such restrictions and burdens, however great, as the legislature may deem it advisable to impose. The only limitations on legislative prerogatives in this area are the equal protection and due process clauses of the federal constitution. *C. Tisdall Co. v. Board of Alderman*, 57 R.I. 96; *Mugler v. Kansas*, 123 U.S. 623.
>
> So also is it settled that the vesting of the licensing power and subsequent regulation and supervision of such licenses in the several municipal governments in the first instance is a constitutonal delegation by the legislative policy determination that the conferring of administrative and regulatory authority upon a governmental agency can best achieve efficient control of the liquor traffic . . . *Id.* at 75-76, 122.

To hold that a board or administrator may not revoke a liquor license without a prior criminal conviction would be tantamount to delegating license revocation authority to the prosecuting arm of government because the prosecutor has discretion in determining which criminal acts will be prosecuted. This would be contrary to the well established principle just alluded to in *Vitterito*.

Having determined that a conviction for receiving stolen goods is not a prerequisite for revocation, the Court must now decide whether evidence obtained as a result of an illegal police search is admissible at a hearing before the Administrator. The Board argues that such evidence is admissibie because 1) the statutory exclusionary rule,

R.I. G.L. §9-19-25, applies only to "trials" and "actions in any court", and not to administrative proceedings, and 2) the "potential benefit from allowing evidence where stolen goods were seized outweighs the harm to the individual involved" and therefore the admissibility of the evidence is constitutionally permissible.

The Board's assertion that § 9-19-25 does not apply to a hearing before the Administrator is correct. The statute reads

> Illegally seized evidence inadmissible.—In the trial of any action in any court of this state, no evidence shall be admissible where the same shall have been procured by, through or in consequence of any illegal search and seizure as prohibited in section 6 of Article 1 of the constitution of the state of Rhode Island.

The hearing is not a "trial of any action in any court." Furthermore, our state Supreme Court has declared that § 9-19-25 should be strictly construed. That court decided in *State v. Spratt,* R.I. , 386 A.2d 1094 (1978), that the statute does not apply to probation revocation hearings, and in deciding this issue said:

> . . . the further question remains whether use of illegally procured evidence at a revocation hearing is barred by G.L. 1956 (1969 Reenactment) § 9-19-25, our statutory exclusionary rule.
>
> That enactment yields no plain answer to that question, and nothing contained therein or in any related enactment even hints at whether the Legislature, in enacting an exclusionary rule that is applicable "[i] the trial of any action in any court of this state." (emphasis added) intended to include revocation hearings. Neither is there any legislative history or other record of the considerations leading to its adoption which might aid in the interpretative function.

> Thus, while the Legislature may have been motivated by diverse purposes when it enacted § 9-19-25, the only clue to those intentions is the knowledge that the statute is undoubtedly a response to our decision in *State v. Olynik,* 83 R.I. 31, 113 A.2d 123 (1955). In the circumstances, the legislative purpose can be reasonably construed as intending to supply a rule of evidence that would make inadmissible that which this Court has held admissible in *Olynik,* see *State v. Davis,* 105 R.I. 247, 252 251 A.2d 394, 397 (1969); *State v. Dufour,* 99 R.I. 120, 136-37, 206 A.2d 82, 91 (1965) (Joslin, J., concurring), thereby negating our refusal to apply the exclusionary rule at a formal criminal trial at which guilt or innocence was to be adjudicated. In our judgment the legislative intention was limited to the accomplishment of that purpose, and we refuse to impute an intention to expand the rule beyond that point. If our reading of the legislative purpose is inaccurate, the enactment of § 9-19-25 in response to *Olynik* makes clear that the Legislature knows how to set the matter straight. *Id.* at 1096 (footnote omitted).

The only remaining issue, therefore, is whether admission of the evidence is constitutionally impermissible as a violation of the fourth amendment's prohibition against unreasonable searches and seizures.[1] See *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961).

Although it is a difficult task "to demarcate the seemingly inexhaustible reach of the exclusionary rule", *People v. McGrath,* 412 N.Y.S. 2d 801, 804, 385 N.E. 2d 541, 543 (1978), the Board's argument that exclusion of the evi-

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1. In *State v. Davis,* 105 R.I. 247, 251 A.2d 394 (1969), the court stated that ". . . art. I, sec. 6, of our [state] Constitution has been construed as having the same effect as the fourth amendment to the Constitution of the United States." *Id.* at 252, 397.

dence is not constitutionally required appears to be incorrect. Where a judicial determination that a search was illegal has been made, a liquor administrator should accept the courts' ruling and exclude the evidence, and should not attempt to make its own determination of the legality of the search. *Commonwealth Liquor Control Board v. Mottola's 51 Tavern, Inc.*, 37 Pa. Cmwlth. 234, 389 A.2d 1213 (1978); *Pennsylvania Liquor Control Board v. Leonardziak*, 210 Pa. Super. 511, 233 A.2d 606 (1967); *Finn's Liquor Shop v. State Liquor Authority*, 301 N.Y.S. 2d 584, 249 N.E. 2d 440 (1969), *cert. den.* 396 U.S. 840, 24 L.Ed. 2d 91, 90 S.Ct.. 103 (1969); *Leogrande v. State Liquor Authority*, 268 N.Y.S. 2d 433 (1966). All of the above cited cases involved a fact pattern essentially identical to that in the case at bar. See also *Sponick v. City of Detroit Police Department*, 49 Mich. App. 162, 211 N.W. 2d 674 (1973) (illegally obtained evidence inadmissible at police trial board hearing); *McPherson v. New York City Housing Authority*, 365 N.Y.S. 2d 862 (1975) illegally obtained evidence inadmissible at dismissal hearing of housing authority patrolman; *People v. McGrath, supra*, at 804, 544 ("the applicability of the exclusionary rule to administrative as well as criminal proceedings in New York can no longer be disputed"). Moreover, the fact that a state liquor administrator had no association with the hearing on the motion to suppress, is not determinative. As the Court of Appeals of New York stated in *Finn's Liquor Shop, supra*, at 594, 447:

> . . . the Authority was not permitted to disregard a court determination (in the criminal case) that the evidence was, in fact, the fruit of an illegal search and seizure. The Authority has given no adequate reason why it should be allowed to re-examine the issue of the legality of a search after a court has already decided the question. It merely asserts that it has no association with the District Attorney's Office and thus should not be concluded by a decision in a case in which it was not a party. Although the two agencies may be treated, for other purposes, as independent parties, this can hardly be the case where they are both seeking to use the same police officials as their agents to gather evidence. If the search and seizure was unconstitutional to the extent that it was performed for the benefit of the prosecutor, the same act could hardly be considered lawful for the Authority's purposes. *Since the facts and the issues are the same, the court's decision on the motion to suppress that the search and seizure was illegal should be determinative of the issue.* Such a decision is, of course, reviewable through the normal appellate process but neither the administrative hearing nor an action under article 78 to review it constitutes an appropriate proceeding to pass upon the propriety of a judicial decision which has never been directly challenged. (Emphasis added.)

The Board, urging that the exclusionary rule does not apply, cites *Spratt, supra*, and *Bridges v. Superior Court*, R.I. , 396 A.2d 97 (1978), a bail revocation case. In these cases the court said the test would be to

> . . . consider whether any increased deterrence of future police misconduct would result from extending the rule and then balance that incremental increase against the risks to society that extension is likely to produce. *Spratt, supra*, at 1095.

But *Mapp* has already emphasized that deterrence of police misconduct and the policy that the government should not benefit from its own wrongdoing are to be accorded great weight in this balancing process. This Court does not fell that a reexamination of the exclusionary rule

is mandated simply because the license revocation process is not labeled criminal. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 14 L.Ed. 2d 170, 85 S.Ct. 1246 (1965) and *Finn's Liquor Shop, supra.* The Board has cited no case where, on facts like those in the case at bar, any court has struck this balance in favor of admissibility of the evidence. The precedent in this area, cited *supra*, holds that exclusion is required.

Because it is clear from the record that the Board, without the inadmissible evidence, does not have sufficient evidence to substantiate its allegation, the decision of the Administrator is affirmed insofar as it directs reinstatement of the license of Attic Lounge.

Counsel shall prepare and submit to the Court an order in conformity with this decision.

OPINIONS BELOW

D. Decision of the Rhode Island Supreme Court is contained in the Petition for Certiorari at pages A-1 through A-10.

STENOGRAPHIC TRANSCRIPT OF HEARING BEFORE RHODE ISLAND LIQUOR CONTROL ADMINISTRATOR, LOUIS H. PASTORE, JR.,

July 6, 1978.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DEPARTMENT OF BUSINESS REGULATION
100 NORTH MAIN STREET
PROVIDENCE, RHODE ISLAND

HEARING IN RE:

ATTIC LOUNGE, INC.
d/b/a CABARET
469 MAIN ROAD
TIVERTON, RHODE ISLAND

HELD ON:
July 6, 1978

BEFORE:

LOUIS H. PASTORE, JR.
LIQUOR CONTROL ADMINISTRATOR

APPEARANCES

ARTHUR W. MURPHY, ESQUIRE _____
_____ TOWN SOLICITOR

MICHAEL A. ABATUNO, ESQUIRE _____
_____ FOR THE APPELLANT

ANGELO MORROCCO, ESQUIRE _____
_____ FOR THE APPELLANT

(p. 1) MR. PASTORE: The meeting is declared opened. This is an open hearing. Everything will be on the record. To start things off, I'm Louis Pastore, Liquor Control Administrator. To my right is Ruth Jackson, our technician. To my left is John Hines, attorney with the Department of Business Regulation.

Would the Town identify itself, please?

MR. MURPHY: I'm Arthur W. Murphy, Town Solicitor for the Town of Tiverton.

MR. PASTORE: Thank you, Mr. Murphy.

MR. ABATUNO: Michael A. Abatuno, I represent the license holder and to my right is Angelo Morrocco; an associate of mine in my office.

MR. PASTORE: Thank you, Mr. Abatuno. My understanding is that we are here on an appeal from a decision made locally that in essence revoked a Class BV license. Mr. Abatuno on behalf of the Appellant brought the appeal to the Administrator. To the best of my knowledge it is here properly. Essentially, perhaps the Town could enlighten us and tell us why this license was revoked, if you would, Arthur, please.

MR. ABATUNO: I would object to the statement by an attorney. I feel that we ought to proceed with the rules and others and have — if you want to make an opening and tell what he intends to prove, I would have no objection.

(p. 2) MR. PASTORE: Fine. Now, my suggestion Mr. Abatuno is let the Administrator run the hearing. Please proceed, Mr. Murphy.

MR. MURPHY: Mr. Administrator, it's the Town's position that the license in question, the licensee in question had a violation of the law occur on its premises, that the licensee was given notice to have a hearing before the Town Council of the Town of Tiverton. The licensee did in fact appear at the hearing represented by Mr. Abatano, that a hearing was —

MR. ABATUNO: May — may I please correct him. My name is Abatuno. It's bad enough, but don't fracture it.

MR. MURPHY: Abatuno, my apologies.

MR. ABATUNO: Thank you.

MR. MURPHY: — that the full hearing was had and that the Board of License Commissioners of the Town

of Tiverton acted properly in revoking the license. And further, we have some procedural defects concerning the appeal which we would — number one of which is that because of the licensee to reapply for the '78 licensing year that he has really waived his appeal and he's out of time, but basically —

MR. PASTORE: Okay. At the proper time. What we're trying to get right now, Mr. Murphy, we're rather informal here. Please be seated and be comfortable. Basically, what I'm trying to get at is that Tiverton made a decision to revoke a license. You claimed that there was a violation of a law. In essence, what are you talking (p. 3) about? What violation of the law?

MR. MURPHY: We stated there was a violation of law and that there were possession of stolen goods on the premises.

MR. PASTORE: I see. And this is the basis of why the license was revoked.

MR. MURPHY: This is the basis.

MR. PASTORE: Do you have any witnesses you want to put forward, Mr. Murphy?

MR. MURPHY: I have the Town Clerk to verify some records and I have a police officer from the Town of Tiverton who accompanied—who was present at the time when the alleged violation occurred.

MR. PASTORE: Okay. Why don't we proceed. Put your first witness on, if you would please.

MR. MURPHY: I would ask the commissioner, the Administrator that the—do you have the record before you that was forwarded from the Town Clerk.

MR. PASTORE: Yes. The record was forwarded to this office upon request. I can share that with both you and counsel, if that's what you're after.

MR. MURPHY: Do you have the pictures, too?

MR. PASTORE: Yes. We have some. It's exactly what we have. The record that was forwarded, and here are the pictures. Would you like an opportunity to examine that and share it with counsel? Okay, let's go off the record for a moment. Let counsel share that information.

(p. 4) (Off the Record)

MR. PASTORE: Okay. We're back on the record. Now, you have, to the best of my knowledge, what was forwarded to us, Mr. Murphy, and that was the record of the council meeting, I imagine it was what—March 28th 1977. You also have a few photographs.

MR. ABATUNO: The record of the council meeting is not an accurate record. I would object for that reason. It's merely a recap or summary in someone else's words, not a verbatim statement. I made an argument that must have lasted at least one hour before the outset of this hearing, when they were saying, "Mr. Abatuno, proceed." It's not up to me to proceed. The burden of proof is on the council.

MR. PASTORE: Okay. The bottom line, as I understand it, counselor, if you object to this record—

MR. ABATUNO: I object to that record because it's not an accurate record, first of all. And secondly, this is a hearing *de novo*.

MR. PASTORE: Absolutely correct.

MR. ABATUNO: And I also object to the statement —the alleged statement of the photocopy of the statement of the witness, not the original but a photocopy of the statement and I don't know who the witness is. I can't read the entire statement. It's hearsay. If they have a witness who wants to testify, let them produce him. Let him testify here today. Then he'll be sworn under oath, there will be a guarantee of trustworthiness and thirdly, (p. 5) I will have an opportunity to cross-examine him.

As far as the pictures go, the pictures fall under a different category. I don't know what these pictures are. They show men's jackets. They could have been taken anywhere. I don't know who the photographer is. Secondly, if they were taken in the establishment and that has not been ascertained, then and if they were in the establishment without a proper search warrant, this is referred to in the law as "fruit from the poison tree". And the matter—if the tree is poisoned and also the fruit are also poison. And everything that follows from an illegal search is also illegal and obtained without due process of law. I see these words on the board and they're all applicable to this hearing.

MR. PASTORE: Thank you counselor. Mr. Murphy, counsel for the Appellant is talking about poison fruit here. Could you enlighten me? Where did all this come from and what's it about and what do you intend to do with it?

MR. MURPHY: First of all, Mr. Commissioner, the law, I think, is quite clear in Rhode Island and in that I refer to Title 3-5-26 and it reads as follows: "The boards

or officials issuing licenses, i.e. the Town of Tiverton hereunder shall keep records of their proceedings with respect thereto and the same are hereby declared to be public records" and it goes on, "copies of such records duly certified by the secretary or the clerk of the board, (p. 6) body or official keeping," and these are certified by the Clerk of the Court, "shall be received in any court as evidence of any of the proceedings contained therein." My brother has brought out a very good point. That's his side of the case. If he wants to argue through the poison tree doctrine, and that doctrine obviously, quite simply is that if there was an illegal search, everything that follows after that illegal search is wiped out.

I don't think that's the status of things—that's the status of things in the criminal side of the ledger. On the civil side of the ledger, that is not—it's the Town's position that it's not the law. However, as we get to first things first, the part of the record quoted to this board is duly certified by the Clerk. The Clerk is here if I need him put on the stand. And while my brother might say that it's inaccurate or inadmissible or, excuse me, not inadmissible, but not relevant to this particular hearing, it is under the law should be permitted here. So I just want to get this record into evidence.

MR. PASTORE: Basically, Mr. Murphy, and I think both of you, or certainly you have been before this board before, basically, we all understand this is *de novo*. However, it's been a long standing custom of ours to accept the record for what it's worth. Now, the record I'm referring to would be the record of the proceedings, March 28, which I'd say roughly, Michael, is a resume of what

happened. It's by no means complete and I recognize that.

(p. 7) MR. ABATUNO: I would have to agree with that.

MR. PASTORE: Okay. So for what it's worth, that document we usually accept. Now, when it goes to the pictures and it goes to, let's say statements of witnesses, at that particular point, John, my understanding is we get a little cautious because counsel does not have the opportunity to cross-examine. And I don't know what you're thinking there, Mr. Murphy. Do you understand the point of the Commissioner?

MR. MURPHY: My understanding is everything that is submitted before the board at the hearing is the evidence that was submitted at the hearing and that is the record.

MR. HINES: Well, Mr. Abatuno said he was at the hearing, but didn't see those pictures. That's the difficulty we have. That if indeed they were part of the record of the hearing, it would fall within the first category Mr. Pastore spoke of, but Mr. Abatuno has said he didn't see those up there.

MR. PASTORE: Do we understand you correctly, Mr. Abatuno?

MR. ABATUNO: Let me correct myself. I have seen those pictures before.

MR. HINES: At the hearing?

MR. ABATUNO: At the hearing. But I agree with what the Commissioner says. This is what the law says

as Mr. Murphy repeated it. "They shall keep (p. 8) records of their proceedings with respect thereto." It doesn't say the evidence. The evidence down there is not evidence up here. What Mr. Murphy tried to do here, is not only introduce the record of the proceedings but also evidence that was produced by him down there and they're two different things here.

I agree with what the Commissioner says. For whatever value it has—

MR. PASTORE: For what it's worth.

MR. ABATUNO: —for what it's worth, the record of the proceedings should be admitted and if we want to dispute a portion of that, we may. But insofar as pictures and statements go, I object strenuously. And insofar as the license goes, the statement of good standing, I would have no objection to the license to show who the license holder is and also to show the fact that the six hundred dollar fee was in fact paid and that the taxes were in fact paid.

MR. PASTORE: What's really an issue here, my understanding, Michael, is the pictures. Is that what's really at issue here?

MR. ABATUNO: The pictures and the statement.

MR. PASTORE: And the statement. Let's go off the record for a moment. Gentlemen, just give me a moment on this.

(Off the Record)

(p. 9) MR. PASTORE: I'll give you a ruling on this portion of it because we would like to get to the meat and

potatoes. Right now we seem to be dealing with the frosting.

Again, our custom has been that we will accept the record for what it's worth. Earlier statements by the Commissioner, by the attorney were more or less aimed at the fact or what we thought was a fact that counsel for the Appellant was not aware or that the pictures or statements were not part of an earlier record. But that becomes clear that it is part of the earlier record. So, for what it's worth, we will accept the record in its entirety. We will note the objection of Mr. Abatuno and any comment that he wants to make regarding any part of this record will be part of the record of this proceeding. So you may go on, counselor, if you will, but this is accepted for what it's worth. Please bring it forward and we'll mark these.

MR. ABATUNO: I would take an exception.

MR. PASTORE: Exception noted.

MR. ABATUNO: I'm going to reserve my right also to cross-examine the party who made such a statement that has been offered. I reserve my right to cross-examine the Clerk who allegedly made that record who is present, I understand. And I also take exception to the admissibility of any portion of the record because although the record is a public record, it does not necessarily mean that it should play any role whatsoever (p. 10) in this hearing *de novo*.

MR. PASTORE: Counselor, do you understand what I say, when I say "for what it's worth".

MR. ABATUNO: Yes, I do.

MR. PASTORE: Okay. Exception is noted and all your rights are reserved, counselor.

MR. ABATUNO: Thank you.

MR. PASTORE: Let us mark these for the record now. First the proceedings of Council Meeting of March 28, 1977, let's mark that Exhibit 1, John. Okay, we have three photographs here. With the photographs, we'll mark them two, three and four, Exhibit 2, 3 and 4. Number 5 will be the applications for license by corporation. Along with that we'll make number five—is that four, John?

MR. HINES: That's five.

MR. PASTORE: Five, we'll make number six Mr. Norberg's Certificate of Good Standing. We have correspondence from Mr. Callahan regarding the Department of Taxation and Good Standing, let's mark that seven. Correspondence from Mr. Callahan, "enclose check amount of $600.00 for the license renewal fee." That's dated December 3rd, 1976, make that eight, John. What would this be, statement of complaining witness, that would come down as—

MR. HINES: Nine.

MR. PASTORE: Number nine.
Okay, Mr. Murphy, where do we go from here?

(p. 11) MR. MURPHY: I'll call my first witness, Sergeant Davol.

MR. PASTORE: Sergeant Davol? Would you spell the last name, please?

MR. MURPHY: D-A-V-O-L.

MR. PASTORE: Your full name and address, please.

SERGEANT DAVOL: Asa, A-S-A W. Davol, D-A-V-O-L, 3879 Main Road in Tiverton. I'm a police officer for the Town of Tiverton.

(Asa W. Davol, sworn)

Examination by Mr. Murphy

Q. Sergeant, how long have you been a member of the Tiverton Police Department?

A. Fourteen years.

Q. And directing your attention to March 11th, 1977, were you a member on that day?

A. Yes, I was.

Q. And were you on duty that day?

A. I was.

Q. And are you familiar, Sergeant, with the location of the Attic Lounge, sometimes known as the Cabaret in the Town of Tiverton?

A. Yes.

Q. And where is its location?

A. It's located on Main Road, approximately two miles from me, down the street.

Q. Now, directing your attention to the day of March 11th, did you have occasion to go to the Attic Lounge?

(p. 12) MR. ABATUNO: I object to that.

MR. PASTORE: What's the purpose of the objection, Mr. Abatuno?

MR. ABATUNO: Is he's (sic) going to—whether he went there or not is unimportant. It's irrelevant and immaterial. Many people—he may have gone to the bathroom that day, he may have been home, he may have gone to church and he may have been anywhere, but whether or not he went there is not important.

MR. HINES: This could be foundation questions or something more significant.

MR. PASTORE: That's what I understand. Let's get him there and see what happens.

Q. Did you go there in your official capacity as a member of Tiverton Police Department?

A. Yes, I did.

Q. And whether of your knowledge was a warrant —to a search warrant for the premises in the possession of the Tiverton Police Department at that time?

MR. ABATUNO: Objection.

MR. PASTORE: Okay. Mr. Abatuno is objecting again. What's the purpose of the objection this time, Mr. Abatuno?

MR. ABATUNO: I'll let him answer that question. I'm not objection— (sic)

MR. PASTORE: Okay. Please answer the question, Sarg.

(p. 13) A. When I went to the premises of the Cabaret which is known as the Attic, there was a search warrant in effect when I went into the building.

MR. PASTORE: Okay.

MR. ABATUNO: Now I'll move to strike it.

MR. PASTORE: Why do you want that stricken?

MR. ABATUNO: I'll strike it because of the fact he didn't say he had it with him. He went to the building. He said there was one in effect, but that does not give him the right to enter the building.

MR. HINES: Your objection goes to the weight of the question. I don't think it goes to the admissibility of it.

MR. ABATUNO: Well then, I refer Mr. Hines to Judge Carrelos' decision which was filed in Newport Superior Court on January 16, 1978.

MR. MURPHY: I think we—may I, Michael I would stipulate that Judge Carrelos' decision knocks out both of the arrests made that day on the basis or partially on the basis that the warrant was illegaliy obtained.

It's the position of the Town, however, and I think the law of this state and I cite specifically The Schernoff versus Sarkas, 109 RI 283 which holds that criminal prosecutions for an offense in liquor license revocations proceedings for the same offense are to be (p. 14) considered as separate and distinct proceedings. I have no—no problem with my brother's proposition that all criminal actions as a result of this illegal search which Carrelos found as an illegal search. Anything that is found out of there is the fruit of the poison tree doctrine applies and—

MR. PASTORE: Arthur, was this part of the search. The illegal search you're talking about, is this what the sergeant is relating—

MR. MURPHY: This is what the sergeant is relating to.

MR. PASTORE: I see. And essentially what Michael is bringing to our attention is that, as you grasp immediately, that it was done illegally and, therefore, everything that follows and so forth and so on.

MR. MURPHY: Yes. I think—and we could be here until four o'clock.

MR. PASTORE: Right. Right.

MR. MURPHY: I'll stipulate that it was—

MR. PASTORE: Okay. Counselor?

MR. ABATUNO: May I be heard on this?

MR. PASTORE: Certainly.

MR. ABATUNO: Rather than argue law, I'm going to have Mr. Morraco argue law because of my speech impediment.

MR. PASTORE: Certainly. Certainly.

(p. 15) MR. MORRACO: The case which my brother refers to Chernov versus Sarkas also stands for the proposition that a cause for suspension must be established by legally competent evidence. My brother has formally said that that case stands for the proposition that a criminal action is separate and apart from the administrative action. I submit that that case also stands for the proposition that legally competent evidence must be used in an administrative proceeding. There's a wealth of authority in this State and in other states that suggest that the exclusionary rule which is the operative tool of the fourth amendment applies not only to criminal action but also applies to administrative actions. If the fourth amendment exclusionary rule didn't apply to administrative actions,

then these particular administrative bodies would be in a position to usurp the power of the Constitution to regulate the activities of police departments. I submit to you that it would be unjust, totally unfair and aggregation of due process for this body not to take cognizance of the fact that the exclusionary rule of the fourth amendment applies equally to this particular type of hearing as it does in the Superior Court. There are three New York cases that stand exactly for that proposition. One case is LaPenta versus the New York State Liquor Authority. That case is cited 294 New York supplement second 947. Another case standing for the same proposition is Anna Malik versus the New York Liquor Authority 30 AD second 1040 and also in the matter of Finn's Liquor Shop, Incorporated versus the (p. 16) State Liquor Authority, 24 New York second 646, 647, excuse me.

For a minute, let's go the administrative procedures act, which is the act which vests power in this board to do exactly what they are doing today. Under Section 42-35-10 of that particular statute, it states, "Rules of evidence as applied in civil cases in the Superior Court shall be followed." This section makes pertinent 9-19-25 of the Rhode Island General Laws which states, "In the trial of any action in a court of this state, no evidence shall be admissible with the same shall have been procured by, through in consequence of any illegal search and seizure as prohibited in Section 6 of Article 1 of the Constitution of the State of Rhode Island.

We have a detailed decision by Judge Carrelos which indisputedly knocks out both of these indictments for two reasons. One reason being lack of probable cause as evidenced by the warrant being deficient on its face and also

because certain procedures went out followed by the police officer, reference to knocking on the door. For those reasons Judge Carrelos threw out both indictments and the cases were dismissed.

I would suggest to this court that this body should not only pay homage to that decision but should be bound by it.

MR. PASTORE: Mr. Morraco, in essence the arguments you and your brother counsel put forth, was this presented locally? Was this presented at the local licensing board hearing?

(p. 17) MR. ABATUNO: It was not, your Honor. Because of the fact that at that time, Mr. — the two people we talked about, Mr. Morett and Mr. Benoit, had been arrested, but not indicted. Now, we have a procedure that's been changed in this State and the men in which —. Before an indictment is issued, the people are arrested. They are placed on bail so they won't leave the state. The Grand Jury considers whether or not they should be indicted based upon testimony and so forth, an indictment issues.

At the juncture where we were at, at the time of the hearing, Mr. — one of them had been arrested, the other one had not. Neither had been indicted at that point. So, the first one had not been presented at the hearing. The burden at this hearing was not on the state as it is here. It was improper placed upon the license holder. They said, "All right. You have a notice that tells you that your license should be suspended. Now, go forward." This is not by me. This is not Russia. The license holder is innocent until proven guilty. They said, "Go ahead. If you want to present evidence, or else you'll be —." I said,

"All right. You leave me no choice." So I called the Chief of Police under the adverse witness statute. And he testified, "No, there was, there was arrest, a warrant, "but he doesn't believe there was indictment but he thought it would be coming out any day. He was even certain whether or not there was an indictment of anybody at that time.

MR. PASTORE: So basically the decision (p. 18) was made following an arrest of certain people?

MR. ABATUNO: There was arrest of at least one person.

MR. PASTORE: Okay. And basically, following that arrest and allegedly finding merchandise in the place, this was what the Council had to work with, Arthur, to make a decision.

MR. MURPHY: That is correct.

MR. PASTORE: I'm just trying to reconstruct and I, you know —

MR. HINES: That's how I see it, too. I think the more important question at this point is, the procedure point that Arthur brought out. Supposing you are right and that you didn't get a renewal of your license in 1978 and we —

MR. ABATUNO: That's a different — an entirely different question.

MR. HINES: — listen to me please. And we do find in your favor as a result of this hearing that the revocation was not rightful. Where does it put you except to make a new application for a new license. Am I wrong?

MR. ABATUNO: I disagree with you, yes. I don't say you're wrong, but I disagree with you. If you read the statute on revocation, it says that all rights of a li-

censee are terminated and once there's a suspension, there's no further — I'm looking for the law of suspension, five —

(p. 19) MR. PASTORE: Sergeant, bear with us. That's as good a seat as anywhere else. We're very interested here at this point in reconstructing this matter.

MR. MURPHY: 3-5-23.

MR. ABATUNO: No, I'm looking for the statute. I have a copy of it here.

MR. PASTORE: Let's go off the record for one moment with your understanding, Arthur. Counsel, let's go off the record.

(Off the Record)

MR. PASTORE: We're back on the record. A little conversation while he's researching his files. You know, John and I, Mr. Hines and myself, in briefly trying to come to some understanding with this matter, quickly and readily see that the job that we have as we see it, Mr. Murphy, is that we have to pretty much look at the action of the Council at the time they acted to see if they acted, let's say reasonably and properly at that particular time that the facts and the situation as it then stood. This is pretty much what our job is going to be, so a lot of where we're going it appears now becomes a bit superfluous to our decision. This is how I'm looking at it right now, John. And unless you see it differently, Murph or Mike.

MR. MURPHY: You know, I felt this way June 7th when I was up here for the regularly scheduled hearing. And, you know, I'm not uncomfortable with my record below.

MR. PASTORE: Michael, again, I mean —

(p. 20) MR. MURPHY: I have some procedural things I'd like to bring out —

MR. PASTORE: Yes. But let's come to this understanding. Now, essentially in reviewing this case, we have to look at the time that the decision was made which would go back to March, Mike, and the facts in the situation at that particular time. I mean, I don't see how we can draw everything else into it that is being put before us right now. I'm finding it difficult to understand the value of that to make a decision of this revocation. There might be another path you have to take for that ruling.

MR. ABATUNO: Mr. Hines asked me a question and I've looked around and I've found the answer. The end of 3-5-23 was talk about revocation says, "In case such license is revoked, such licensed person after such revocation shall cease to have any authority under said license and shall be disqualified from holding any of the licenses provided for in this title for a period of five years." This means to me that for a period of five years, where as it was we spent $600 for this license and held it from December to March. No rebate has ever been furnished and I'm sure there's none alleged. To spend $600 a year for each year would have been throwing away money without the use of the license.

MR. HINES: But Mike, I'm asking this. I'm looking at remedy more than — maybe I'm a little immature in it. But if we do find in your favor and — what do we say? We say they were wrong in a revocation (p. 21) and we reinstate it and for 1977? And what about the renewal for '78? We're not a superimposed licensing authority, I don't think to do that.

MR. ABATUNO: I feel that in equity a judgment would have to be made between the license holder and the Town licensing authority, to pay the difference on — mind you if they're held to be wrong, they are obliged to grant them. Mind you, this business has been out of business since the day of that revocation. Think of the loss of profits that have been inured.

MR. HINES: That's not within the framework of our remedy.

MR. ABATUNO: I realize that. By the same token — I've answered your question. But for five years we were not eligible to even file an applicatnon.

MR. HINES: At the conclusion of the hearing, would you speak to the question of the remedy that you're seeking? Not now, at the conclusion, if you don't mind. I see some problems with that.

MR. PASTORE: Yes. I don't know how far we can go in that direction. You're quite right. Then again, we might be wandering in a direction that is not meant to be anyway. Let's get back to the time that the Council sat down and made a decision.

We have the Sergeant here and we got the Sergeant to the point where there was an illegal search, as I understand it. Now, it's going to get exceedingly difficult at this point. Obviously, Arthur, to go forward (p. 22) with the Sergeant's testimony, unless you have some thoughts on the matter.

MR. MURPHY: Well, it depends how this board rules. If the board rules that the Sergeant, you know that they going to apprise the period that Angelo opposes and exclude all evidence, that's the end of our hearing *de novo*. But you still have in front of you what the Council did.

And I'm not uncomfortable with that record. The record shows what was found in there and you know if — if the Sergeant wants to testify, he can testify —

MR. PASTORE: Of course, Mike disputes that which we understand. The record is here and of course the record is — he objected to the record to begin with, but we got, with exception noted, we got it before us and basically we think we understand why the Council did what they did. They looked at merchandise, they looked at arrests they put everything together and say, "Okay, this is not how we want a licensee to function," and then he said, "Four to three," as I understand it here, revocation. That's basically how it went. Now, since then there's an awful lot of water's gone over the dam which you're bringing forward now and, you know, I'm just wondering if it's — Well, what is it, John, at this point. We've gone far beyond, I think, the situation or the facts that we need to make a decision — make a decision. This has a bearing but I'm wondering if this is the right forum for that.

MR. MURPHY: I think it does have a bearing because it does go to the issue of whether their (p. 23) license has expired, whether they have waived or lost any right that they might have had.

MR. HINES: That's your second argument.

MR. MURPHY: That . my second argument.

MR. HINES: Basically why I think — I think Mr. Abatuno's position is well taken about the exclusionary rule. I tend to agree that it does pertain and I would suggest that we so rule. If that be the case then, Mr. Murphy, I think your position would be to rest on the record you have submitted and then proceed which we've accepted for

what it's worth. And then proceed with your procedural argument.

MR. MURPHY: I have a couple of procedural arguments which I would like to develop.

MR. HINES: Is that satisfactory?

MR. PASTORE: I think this would be the fair way to go and I think we can excuse the Sergeant, unless there's any —

MR. MURPHY: If that's the Commissioner's ruling, you know, the Administrator's ruling, that's the ruling.

MR. PASTORE: This is the ruling, Frank. We are, Arthur and I —

MR. MURPHY: For the record, I'll take an exception.

MR. PASTORE: Okay. For the record, your exception is noted. Sergeant, maybe you can view this from another chair. It's just as comfortable down there. Thank you, you're excused.

(p. 24) Okay. Let's get into the next issue, Arthur, which is essentially is now what?

MR. MURPHY: Procedural.

MR. PASTORE: What happens to the—what happened to the license, the status of the license and so forth.

MR. MURPHY: I just want to call the Town Clerk to the stand, if you will.

MR. PASTORE: Your full name and address, please.

MR. FRENCH: William Joseph French, 57 Fir Avenue, Tiverton, Rhode Island.

(William J. French, sworn)

MR. MURPHY: May I have a moment, please?

MR. PASTORE: Yes. Off the record for a moment, please.

(Off the Record)

MR. PASTORE: Yes, we're on the record now. Yes, Mr. Murphy. You may be seated, Mr. French.

Examination by Mr. Murphy

Q. You are the Town Clerk of the Town of Tiverton?

A. I am.

Q. And were you the Town Clerk at the commencement of this hearing on March 28th, 1977?

A. Yes.

Q. And you have continued in that capacity as a Town Clerk?

A. Yes.

Q. As Town Clerk, did you at my request search your records (p. 25) for the application of license—excuse me, for license—liquor license renewals in October of '77?

A. Yes.

Q. Were you able to locate a renewal application by the Attic Lounge, Inc.?

MR. ABATUNO: I object.

MR. PASTORE: What's the purpose of the objection?

MR. ABATUNO: Because of the same section I just quoted for Mr. Hines.

MR. HINES: Will you stipulate that there wasn't such an application made?

MR. ABATUNO: Was not and could not.

MR. PASTORE: Well, was not, but could not, you can explain. But was not—what you're trying to do is get in the record.

MR. MURPHY: I will show that it wasn't—that they didn't do it.

MR. PASTORE: There was no renewal.

MR. ABATUNO: I will stipulate that we did not renew because we were under the impression we could not renew while this appeal was pending until you made a decision. If you sustained it, the revocation, under those circumstances--five more years from the date of that—retroactive to the day of revocation, there would have been a—

MR. PASTORE: The bottom line answer is, you did not renew.

MR. ABATUNO: Did not renew.

(p. 26) MR. PASTORE: Do we need anything further of Mr. French?

MR. MURPHY: A couple of things.

Q. Mr. French, I show you an abstract of the Council Meeting of April 11th, 1977 and ask you if you recognize it?

MR. ABATUNO: I would object. It has nothing to do with whether or not the Town Council properly revoked this license. It's after the day.

MR. PASTORE: Well, I'm in the dark here. What are talking of. We're talking about—

MR. PASTORE: Well, I'm trying to show and I'd like to be able to show this. That subsequent to the revocation, there was another application—

MR. ABATUNO: No, now wait a minute. There's no evidence about another application.

MR. PASTORE: Well, he's trying to bring this forward. Is this something, John? I think we'd be interested in this.

MR. HINES: Yes, sir.

MR. PASTORE: Yes, we'll let him proceed with this, Michael. Go ahead, Arthur.

MR. ABATUNO: I object. Take an exception.

MR. PASTORE: Exception noted.

Q. Mr. French, is that a true and accurate copy of the record of the meeting of April 11th, 1977?

A. From our records, yes.

Q. Mr. French, I show you, or do you have in your possession a copy of a liquor license application dated March 15th, 1978?

MR. ABATUNO: Excuse me. What Mr. (p. 27) Murphy just presented was not in fact an application for a license. He presented what was a proposal limiting liquor licenses. That's what that was.

MR. PASTORE: You know, this business you're talking on April 11th, Arthur, is something that, again you know, we're in the dark. We'd like to see what we're talking about here. It's been attested to, it took place, right?

MR. MURPHY: I'm jumping ahead of myself.

MR. PASTORE: All right. Let John and I examine this for a moment. Let's go off the record.

(Off the Record)

MR. PASTORE: Essentially, this Council Meeting of May 9th, what I see here is that there was a motion passed, four to three in limiting Class BV liquor licenses.

MR. ABATUNO: Wait a minute. You're looking at May 9th. I don't have that. It's April 11th of 1977.

MR. PASTORE: Okay. Now, wait a minute. The Council Meeting of April 11th, 1977, excuse me. That's correct. Well, what's the purpose of this, Arthur? Where are we going?

MR. MURPHY: The purpose of this is to lay some foundation to show that there was an application for a liquor license made for this same premises in March of 1978. It is my proposition that this buttress is my theory that they kissed this former license good-bye because—

(p. 28) MR. PASTORE: That's your position.

MR. MURPHY: That's my position. That's all I'm trying to show. It's up to you to decide what to do with it.

MR. ABATUNO: We wouldn't be here today if we had kissed it good-bye.

MR. PASTORE: Okay. I'd be interested in your response where this is concerned.

MR. MURPHY: They kissed it good-bye until Carrelos pulled it out of the hat.

MR. PASTORE: My goodness, we had poison fruit and now we have kisses. This is a very interesting hearing this morning. Well, did you kiss it good-bye, Mike?

MR. ABATUNO: Absolutely not.

MR. PASTORE: Absolutely not.

MR. ABATUNO: First of all was it May—March 27th or March 28th, the day of the revocation?

MR. PASTORE: 28th.

MR. ABATUNO: 28th of March. Now, the 28th of March of 1977 they revoked this license. And then they tried to nail the door closed so we won't be able to walk back in even if it was sustained here after the hearing on this appeal by saying, whatever the number is right now, that's it. And they try to freeze us out. But I humbly suggest that what they tried to do is not legal. They can't do that. If we have a license and its revoked (p. 29) illegally and you sustain the fact that our contention is that it was revoked illegally, they can't close the door to us coming back in because of some action taken by the Council on April 11th, 1977.

MR. PASTORE: You have a point. In fact, Michael, when you and John, Mr. Hines and yourself, were discussing that back and forth, that's an interesting question. What happens if we overturn the Town? What happens to that revocation? Well, then the license is no longer re-

voked and it would appear to be a license there. I mean, it just didn't disappear.

MR. MURPHY: No question about that. If we're wrong and you own a license—

MR. PASTORE: There's a license there.

MR. MURPHY: —and you overturned a revocation, the license is there.

MR. PASTORE: Okay. Now what's your procedural point, that this—

MR. MURPHY: My procedural point is that they came in and they applied again in March of '78.

MR. ABATUNO: Who did?

MR. MURPHY: The Cabaret.

MR. ABATUNO: The Cabaret Inc. is not Attic Lounge, Inc. That's a different corporation.

MR. MURPHY: Thank you. I'll excuse the Clerk and I'll withdraw that Exhibit.

(p. 30) MR. PASTORE: Okay—

MR. MURPHY: The one that—

MR. PASTORE: The one that has to do with the freeze. It appears that no one's lasting in that chair too long. I've got to say that, you know. You're excused, Mr. French. Thank you.

MR. MURPHY: Okay. My last procedural point, may I?

MR. PASTORE: Yes. I can't wait, Arthur. Some of these points are very, very interesting. What have you got now?

MR. MURPHY: I hope I saved the best for last because this thing has been pending for 14 months and during that 14 months, the Secretary of State has revoked the Charter for the Attic Lounge, Inc. I have a motion to dismiss presented to the Council and the Administrator. And I think it's dispositive. They have no standing for appeal, they're gone.

MR. PASTORE: Has your—is the counsel, that is counsel for the Appellant, has he had an opportunity to take a look at this?

MR. MURPHY: A gave it to him right now.

MR. PASTORE: Okay. Let's, let's listen to Michael. We'll reserve decision for the moment here. Let's listen to Michael. Michael, how do you view this?

MR. ABATUNO: First of all, the action to forfeit the Charter is usually or one of the ways of doing it is if there are any reports not filed when they're (p. 31) due. There were in fact three annual reports overdue. There were in fact filed. Mr. Callahan is here. He has prepared them and he has filed them. There is a penalty of $25.00 that is paid over and above the $15.00 fee, the filing fee. I am led to believe that that has also been paid.

MR. MURPHY: This is dated July 5th, 1978.

MR. ABATUNO: Well, then the left hand does not know what the right hand is doing up at the State House because I'm led to believe that it has been taken care of approximately two weeks ago. Am I right, Mr. Callahan?

MR. CALLAHAN: The papers were prepared and the annual reports were given to the President, Mr. Souza with the check and he was supposed to mail it unless it was longer than that.

MR. ABATUNO: Let me put it to six to seven weeks ago.

In the event that that Charter is dead and cannot be revived, I would say that would be the end of the license. But I would ask in the same manner that Mr. Murphy asked for a postponement of one week to allow him to prepare because he assumed we were here on a question of the opening. This is something new, it's new to me. It's found on me. Just now it is found on the Commissioner.

MR. PASTORE: Well, he certainly saved the best for last, didn't he, Michael?

MR. ABATUNO: Yeah. Yeah, he did. You have to wait, you have to admit that.

(p. 32) MR. PASTORE: It is new and you caught us all by surprise, Arthur. Shame on you, shame on you.

MR. ABATUNO: But, I feel that it's not dispositive because of the fact that—give us one week to cure this problem and I assure you that it will be cured, if it hasn't already been.

Mr. Callahan personally went to the State House. That Mr. Callahan the attorney for this corporation and in connection with the Massachusetts interests, I would presume to Rhode Island interests, personally went to the State House, picked up the forms, completed them for the three years in which they were in arrears and Mr.

Hines—Hines knows that four years is the point of no return. But three years can be salvaged by the payment of the fee prior to the—filing fees, and with the filing of the annual report and a $25.00 penalty without action or anyone, neither the Secretary of State nor anyone, the mere filing of these is sufficient.

MR. PASTORE: If you follow this course, any problem with a postponement, come back and try to finalize this thing, this might go on all summer long, Michael.

MR. ABATUNO: I wouldn't ask you to decide the case. Now, subject to our being able to furnish proof to you that this corporation is not faulty, then it is in good standing.

MR. PASTORE: Why couldn't we finalize the hearing and subject to, you know, at least that way (p. 33) we can at least complete the hearing. Because this coming back and forth, I think—

MR. ABATUNO: Yes. Without the necessity of all witnesses—

MR. MURPHY: I object.

MR. ABATUNO: Even Mr. Murphy.

MR. PASTORE: Yes. Okay, objection noted. But we'll allow that, Michael. That's not unreasonable, within seven days we can clear that up.

Arthur, anything else here. We have your latest bomb shell before us and it's in abeyance right now. Is there anything further, John?

MR. HINES: There is an Exhibit.

MR. PASTORE: Yeah. I feel now, we're going to Exhibit 9?

MR. HINES: No, ten and eleven.

MR. PASTORE: Ten and eleven. Yes, that would be the motion. This would be the Exhibit. We'll mark this number 10.

Arthur, anything further from the Town?

MR. MURPHY: I'm trying—for one second.

MR. PASTORE: Yeah. Okay, let's go off the record.

(Off the Record)

MR. PASTORE: We're on the record now. Again, we ask Mr. Murphy if there's anything further on behalf of the Town?

MR. MURPHY: I don't have anything (p. 34) further at this time.

MR. PASTORE: I think, in essence, then we've pretty much covered the waterfront. We can reserve decision subject to receiving the information which Mr. Abatuno said he would provide us within seven days. And, gentlemen, with your understanding we can close the hearing at this time and we'll be waiting for that information and a reasonable time after that we'll come to a hopefully fair and responsible decision.

Thank you, gentlemen. The meeting is closed.

CERTIFICATION

I do hereby certify that the foregoing, pages 1 through 34, is a true and accurate transcript of the testimony according to the electrical recording taken on July 6, 1978.

/s/ Ruth Jackson
Recording Technician

RHODE ISLAND GENERAL LAWS § 3-12-3 (1956, AS AMENDED)

3-12-3. *Entry on licensed premises — Arrest without warrant — Evidence of unlawful sales.* — The mayor and council of any city or the town council of any town, or either member thereof, or the chief of police of any city or town, or any police officer, or any constable specially authorized by said council or town council, or any member of the division of state police, or agent of the department of business regulation, may at any time enter upon the premises of any person licensed under the provisions of this title, to ascertain the manner in which such person conducts his business and to preserve order; and every such chief of police, police officer, constable or member of the division of state police, shall have the power to arrest, without a warrant, all persons found actually engaged, in the premises thus entered, in the commission of any offense in violation of any of the provisions of this title, and to keep such persons so arrested in custody until they can be brought before some magistrate (but for a period not to exceed twenty-four (24) hours) having the proper jurisdiction of such offense in the same city or town, to be dealt with according to law; and whenever any person is seen to drink any beverage in such premises, or in any part thereof, on any days or hours prohibited, under the provisions of this title, it shall be evidence that such beverages were sold and kept for sale by the occupant of such premises or his authorized agent.